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Mr. Craig Melodia
C-14J
USEPA Region 5
77 West Jackson Boulevard
Chicago IL 60604

Re: Skinner Landfill Site
Our Client: Georgia-Pacific Corporation
Our File No. 11533-17

Dear Mr. Melodia:

Georgia-Pacific Corporation and the Plaintiffs in a Skinner Landfill Site litigation have reached an agreement in principle on a *de minimis* settlement for Georgia-Pacific Corporation. I understand that Michael O'Callaghan has already communicated this information to you. While Georgia-Pacific Corporation continues to maintain that it is not liable for response costs at the Site, Georgia-Pacific Corporation has agreed with the Plaintiffs to pay $207,309.77 for a *de minimis* settlement in connection with the Site.

Mike O'Callaghan asked me to forward to you the allocator's Preliminary and Final Allocation Reports regarding Georgia-Pacific Corporation. The reports have been redacted to exclude the names of parties other than Georgia-Pacific Corporation, and have also been redacted to exclude any information regarding parties other than Georgia-Pacific Corporation.

Please do not hesitate to contact me if you have any questions. I assume that I will be hearing further from either you or Mike O'Callaghan concerning execution of the Consent Decree as a *de minimis* party.

Sincerely,

OPPENHEIMER WOLFF & DONNELLY LLP

Gary P. Gengel

Enc.

cc: Michael J. O'Callaghan, Esq., via US mail (w/enc.)
Ronald T. Allen, Esq., via US mail (w/enc.)

GPG/ecl

GEORGIA-PACIFIC CORPORATION ("GP")

GP's alleged liability stems from two theories: (1) facility shipments to the Site prior to GP's acquisition of the assets of this entity and (2) Chem-Dyne transshipments.

facility. This plant is located on It was acquired by GP on January 8, 1969 from and was sold on March 29, 1985 to GP explained that all documents were transferred to when the facility was sold to in 1985.

There is no question that waste reached the Skinner Site before January 8, 1969, when GP acquired the company. Charles Ringel testified that he hauled waste to the Site from . Mr. Ringel described the disposal of two dump truck loads of drums at the Site between 1963 and 1968. Each load had four or five drums, some buckets and bags. Mr. Ringel testified that he was told that the drums contained printing ink. They were full (based on their weight when he moved them off of the truck), he said. The drums were marked with labels representing different colors. He mentioned a apparently related to wrapper coloring. The buckets were also full and labeled as inks. They contained ink as well, he was told. He did not know if the bucket inks were different from the inks in the drums. The bags contained lampblack. "It was like soot." He had a bag "bust open," he said and he had seen lampblack before. These drums were taken to the waste lagoon where they were dumped off the truck, Mr. Ringel said. Mr. Skinner knew that the waste contained inks. Mr. Ringel told him about the waste and he directed Mr. Ringel where to deposit the waste. C. Ringel Depo., p. 31-37.

I am treating this testimony as representing 248 gallons per load (4.5 drums x 55 gallons) of drummed waste. I have no guidance on the number of buckets or bags. Mr. Ringel's truck was 9 cys in capacity, he said and he said that the loads he took were full loads. C. Ringel Depo., p. 31. He said he could fit 100 buckets in a single load. Given the presence of 4-5 drums, plus bags of lampblack, I do not think it is unreasonable to conclude that each load also contained 15 buckets at 5 gallons per bucket, or 75 gallons. I am going to assume 7 cys of bags in each load.

Mr. Ringel's recollection, GP says, is confirmed by the Skinner log which references charges to on two occasions in 1967. The log entries were:

July 11, 1967	$120.25
November 7, 1967	$191.75

for which the company was charged a total of $312. I do not believe that Mr. Ringel's testimony is embraced by the Skinner log charges. Based on the pattern of drum pickups from the facility (see discussion of below), I believe that the charges represent direct pickups by John Skinner after Mr. Ringel's pickups. In the case of , John Skinner began collecting from in 1965 and appeared to alternate collections with until 1967 when Skinner did most of the collecting. Mr. Ringel told EPA that came to him because of a reference by . EPA Interview, p. 16 (SD0012332). He also testified that John Skinner took over the collections for him. C.

Ringel Depo., p. 46. Hence, it does not follow that the two Skinner log charges would represent the two disposal events by Mr. Ringel.

In addition, the dollar amounts in the log would not be consistent with two loads of waste disposal. In the case of , Mr. Ringel said he was charged only $12 per load when he delivered buckets to the Site and $1 per drum. C. Ringel Depo., p. 23. The dollar amounts in the log would represent many more than two loads.

If the individual charges in the log had been a round number, I might have concluded that $312 represented 52 loads (dividing by $6). Because the amounts recorded were not round numbers, it does not appear that a charge of $6 is appropriate. Based on Mr. Ringel's testimony and based on charges determinable elsewhere (see discussion of the 1967 Skinner invoice charging $7 per load for a packer truck) and, considering how I dealt with the waste as recorded in the Skinner log (see discussion below), I have decided to use $2 per drum and $24 for the remaining portion of the load which represents approximately 9 loads ($9 per load for drums plus $24 is $33 times 9 is $297 which is close enough to $312). I am treating each load as containing the amounts set forth above. Thus 9 loads plus Mr. Ringel's two loads would represent the following:

11 loads x 247.5 gallons per load (drums) is	2,723 gallons
11 loads x 75 gallons per load (buckets) is	825 gallons
11 loads x 7 cys of bags is	77 cys

The question is whether GP became liable for waste disposal.

The Agreement Between and GP. In its position paper and questionnaire response, GP argued that it did not assume the environmental liabilities of . It directed me to Paragraph 4.2(e) of the agreement between the parties. It said that this paragraph provided that GP would assume only "certain" 'other liabilities and obligations'" of , up to an aggregate of $25,000. It further said that agreed, in Paragraph 6.1(a) to indemnify GP for "any and all liabilities" of "of any nature whether accrued, absolute, contingent, or otherwise existing at December 31, 1967." GP advised me that since the purchase of "the assets" of , it had discharged the specific liabilities assumed and "other liabilities and obligations" of more than $25,000. "As a result," GP concluded, "no reasonable argument can be made that Georgia-Pacific assumed any liability with respect to the Site."

The agreement between the parties begins with the phrase, "This agreement and plan of reorganization" is dated July 1, 1968 between (which also involved the sale of shares of stock of a printing company called) and GP. It then reads:

> G-P has delivered to a copy of G-P's Annual Report for the year ended December 31, 1967, along with a Proxy Statement directed to the stockholders of Georgia-Pacific Corporation dated September 20, 1967, and an Interim Report to its shareholders for the quarter ended March 31, 1968. has reviewed such documents and desires to enter into a reorganization with G-P within the meaning of Section 368(a)(1)(C) of the Internal Revenue Code of 1954, whereby will exchange substantially all of its assets for shares of Common Stock of G-P (hereinafter referred to as "G-P Stock"), and *G-P will assume the liabilities and obligations of* after which will, in the process

of dissolution, distribute such shares to its stockholders according to their respective interests.

(Emphasis supplied). GP's Questionnaire Response, Exhibit 1, page 1. Having stated that GP will assume the liabilities and obligations of , the Agreement then has none of the indicia of a simple asset purchase. It reads like a merger agreement.

Article I of the Agreement contained representations regarding its good standing as a corporation and its capital stock. delivered articles of incorporation to GP along with financial statements with the representation that they fairly represented the condition of the company as of the dates of the statements. further represented that it had no liabilities or obligations exceeding $25,000 in the aggregate "of any nature, whether absolute, accrued, contingent or otherwise, or whether due or to become due."

then set forth a schedule of its plants and real property, and its intellectual property rights. promised that it would not declare or pay any dividends prior to the Closing date or grant any rights to buy stock. It also agreed that it would not discharge any liabilities not shown on the balance sheet and that there was no material change in its condition since December 31, 1967 and would be none prior to the Closing date.

was required to represent that it was not a party to a contract or a lease under which the total liability exceeded $5,000. All of the policies of insurance of were listed and had to be endorsed to GP with loss payable clauses. had to represent that it was not a party to litigation that would adversely affect "the business, property or assets" of if a judgment was entered against . further had to represent that its tax returns were filed properly and all taxes were paid.

had to schedule the names of its officers, all persons who received compensation in excess of $15,000, the name of all banks where had an account or safe deposit boxes and the names of the persons who could access either, and the names of persons holding a power of attorney.

GP made representations about its capital stock. It also made a representation that it was not a party to any action where there was no insurance coverage which if resolved unfavorably would have any material adverse effect on GP's business, property or assets.

agreed to give GP access to all books, contracts, commitments and records of . It agreed to furnish GP with "all information concerning their affairs as G-P may reasonably request." GP covenanted that "in the event the transactions contemplated by this Agreement shall not be consummated, it will return to and all data, reports and other documents furnished to it" by and agreed to maintain the confidentiality of whatever it may have learned.

Until the Closing date, also agreed that, unless it had the prior consent of GP, it (a) would not dispose of its properties or assets except in the ordinary course of business; (b) would not issue stock or pay dividends; (c) would not discharge liabilities except in the ordinary course of business; (d) would not mortgage, pledge or subject to lien or other encumbrance any of its properties or assets; (e) would not increase the compensation of officers, employees or agents except for normal merit increases; (f) would use its best efforts to preserve its business organization, to keep available to GP the services of present officers

and employees, and to preserve for GP its business relations with suppliers and others having normal business relations with ; (g) would not change its Articles of Incorporation or By-Laws; and (h) would not enter into any contract or lease except in the ordinary course of business and then only with the prior consent of GP if the amount involved exceeded $10,000.

was to hold a meeting of its Board to vote upon the sale of assets and liquidation and dissolution of "as contemplated by this Agreement." also agreed it would make no disposition of GP stock issued under the Agreement except by distribution of the stock to the stockholders of after the liquidation. In effect, the shareholders of became shareholders of GP.

Under Article IV, was required to assign to GP "all of the assets, properties and business of of whatever kind or character, real and personal, tangible and intangible, known and unknown, and wherever located, including the right to use corporate name and all other names used by in connection with its business." GP agreed to issue stock in return after which was required to "promptly" (Paragraph 4.1 and 4.4). In addition to delivery of the stock, GP agreed "to assume and agreed to pay and discharge" the liabilities shown on the balance sheet, related to taxes, related to contracts and leases and related to the ordinary conduct of business after December 31, 1967 to the Closing date. It was after listing these liabilities that the Agreement then included the catch-all clause that GP assumed "other liabilities and obligations" of

> (not exceeding $25,000 in the aggregate), whether absolute, accrued, contingent or otherwise; always excepting, however, those arising out of or in connection with this transaction and the subsequent liquidation of

GP then also assumed all liabilities of related to its labor agreements and its pension plans.

was permitted to spend $50,000 to pay for its expenses incurred in the consummation of the transaction, including its dissolution. was also authorized to pay the fair cash value for any shares held by persons entitled to payment under a certain provision of Ohio law. Any cash withheld by to make such payments and which was not needed was to be paid to GP.

Under Paragraph 5.2, all of the obligations of under the Agreement were subject to certain events including rulings from the Internal Revenue Service that (i) consummation of the Agreement will constitute a reorganization under the provisions of Section 368(a)(1)(C) of the Internal Revenue Code, and (ii) no gain, loss or income will be recognized to as the result of the transfer of assets "and *the assumption of its liabilities* pursuant to this Agreement in exchange for shares of GP stock." (Emphasis supplied.)

Under Article VI, or "distributees" (of the GP stock) agreed to indemnify GP against liabilities of any nature, whether accrued, absolute, contingent, or otherwise *"existing at December 31, 1967"* to the extent not reflected in or reserved against in full in the balance sheet. (Emphasis supplied.) The indemnity also covered all liabilities arising out of the conduct of the business between December 31, 1967 and the Closing date, other than those arising in the ordinary course of business, and those arising from a contract or lease

not disclosed to GP or approved by GP if entered between the date of the Agreement and the Closing date. It also covered damages from any misrepresentation, breach of warranty or nonfulfillment of any agreement on the part of under the Agreement. The right to indemnity did not accrue until damages in respect of the above matters aggregated more than $25,000.

This contract does not, in my judgment, represent a simple sale of assets. By its terms, GP specifically assumed the liabilities of "whether absolute, accrued, contingent or otherwise." The aggregate limit of $25,000 is not a limitation that helps GP. Nor does the indemnity. The indemnity was limited to liabilities of *existing at December 31, 1967* and not shown on the balance sheet. The CERCLA liability of did *not* exist at December 31, 1967. It only came into existence after CERCLA was adopted in 1980. The limit of $25,000 in Paragraph 4(e) related to and must be read in conjunction with the indemnity in Article VI. Read together, GP accepted *all* liabilities of but received an indemnity for liabilities in excess of $25,000 that (a) existed at December 31, 1967 *and* (b) were not shown on the books. This liability does not fit that description.

Moreover, in two places in the document, as noted above, there is an explicit reference to GP's assumption of liabilities as part of the tax-free reorganization.

In addition, this tax-free reorganization looks like a merger with a different name. shareholders became GP's shareholders so there was continuity of shareholders, despite GP's argument that there was not (because they did not become GP shareholders immediately). The argument that stayed in business is disingenuous. By the terms of the agreement, was required to dissolve. De facto merger principles appear to be satisfied here.

For purposes of this process, based on this Agreement, it is my judgment that GP is responsible for the Superfund obligations of

Waste-in Amount. I am assigning GP a waste-in amount as set forth above of:

11 loads x 247.5 gallons per load (drums) is 2,723 gallons
11 loads x 75 gallons per load (buckets) is 825 gallons
11 loads x 7 cys of bags is 77 cys

GP listed 19 other facilities within 75 miles of the Site, five of which may have used Exhibit A transporters. I discuss them here but I am not assigning GP a waste-in amount because of them.

William Blevins testified that he hauled Georgia Pacific waste to the Site when he worked for He described the waste as containing steel banding, nails, plywood, and sawdust and said that most of it was salvaged. A 20 cy box was used and was filled every 2-3 weeks. Mr. Blevins hauled this waste for two years while he worked for Blevins Depo., p. 9, 17-19, 26-28. Treating "most" as 18 out of 20 cys, I am assuming that 2 cys every 2-3 weeks was disposed of in the Landfill. Giving one-half of this sum to Georgia Pacific, another 42 cys (1 cy x 52 wks/2.5 x 2 years) will be assigned to Georgia Pacific's solid waste-in total, taking it to 119 cys.

Cincinnati Millwork Specialty Center, Circle Freeway, Cincinnati [6/12/87-present]. This facility was a wholesale distributor for millwork products (moldings, doors, and windows) to lumberyards and dealers. Waste included wood scraps, paper trash and packaging materials. It may have used prior to GP's ownership of the facility.

Cincinnati Distribution Center, Dues Drive, Cincinnati [8/10/71-1/30/97]. This facility was a wholesale distributor of general building products. Waste included wood scraps, paper trash and packaging materials. It too may have used from 1971 - 1990.

Cincinnati Box Plant, W. North Bend Rd., Cincinnati [11/23/81-present]. It manufactured cardboard boxes. Waste included wood scraps, paper trash and packaging materials. It used for portions of 1981 - 1990.

Trucking Facility, Jefferson Rd., Middletown, OH [10/5/82-2/1/85]. This was a trucking terminal. It would have had general trash. It used from 1982 - February 1985.

Pulp and Paper Transport, Garver Rd., Monroe, OH [2/1/85-??]. This was also a trucking terminal and would have also generated general trash, GP said. It issued purchase orders to for landfill charges in 1990. One invoice from August 24, 1987 was for the purchase of materials and services from . Also, a November 29, 1989 purchase order for dumpster rental and pickup from was produced.

Chem-Dyne. Finally, GP was one of the parties named by EPA as related to the Skinner Site because of Chem-Dyne transshipments. According to EPA, the following constituents allegedly made up the solvent ink wastes sent to Chem-Dyne by GP: ethyl acetate, ethyl alcohol, hexane, isopropyl acetate, lactol spirits, methyl ethyl ketone, normal propyl acetate, toluene, xylene.

GP believed that it only shipped solvent ink wastes to Chem-Dyne during calendar year 1979. The company listed 13 shipment dates (all in 1979), some of which indicate gallons and some specify drums. There were 10,000 gallons in total listed plus 849 drums. The solvent ink waste was sent in drums -- some open head and some closed head with bungs. They were either orange or black in color. GP stated that the drums were picked up by and taken to Chem-Dyne. The wastes were to have been used in Chem-Dyne's fuel program but GP said it had no knowledge how the wastes were actually handled. As late as 1982, at least, some of GP's waste was still present at the Chem-Dyne facility. The company stated that the actual shipping documents were no longer available.

GP provided a document that purported to contain EPA's contentions as of December 1, 1984 regarding GP's connection to Chem-Dyne. That document stated that during 1978 and 1979 GP's Cincinnati Label Division operated a printing facility located at 4575 Eastern Avenue, Cincinnati, which was engaged in the printing of labels for sale to commercial customers. It generated solvent ink wastes through the cleaning of parts and equipment, printing operations and floor cleaning. On or about 1/1/79, GP issued its purchase order no. 16032 to Chem-Dyne Corporation, Hamilton, OH covering the routine disposal of waste solvents for the 1979 calendar year. The solvent waste stream from this facility consisted of hazardous substances based on the following: (a) a flash point less than 140°F, (b) a mixture containing F005 solvents -- toluene and methyl ethyl ketone, (c) a

mixture containing F003 solvents – xylene and ethyl acetate, and (d) a mixture containing toluene. During 1982 - 1983, GP's drums, which had been used for ink solvent wastes, were observed at the Chem-Dyne site in Hamilton. Some of these drums still contained solvent wastes; some had pick holes, bottom seams missing, were rusted, dented or had lids missing. On May 28, 1982, there was a release of at least 55 gallons of solvent waste from GP's drums onto the ground at the Chem-Dyne site, EPA alleged. During 1982 - 1983, GP arranged for the removal of 87 drums from this site. GP did not remove all of the drums which had been identified by the Ohio EPA as belonging to GP.

As set forth in the discussion of the Chem-Dyne share in the main body of this report, because I have determined that waste received by Chem-Dyne in 1979 are not related to the Skinner Site, I conclude that GP has no Chem-Dyne responsibility.

GEORGIA-PACIFIC CORPORATION

Georgia-Pacific Corporation ("GP") submitted comment briefs on October 29, 1998, and February 10, 1999. GP explained that the Preliminary Report set forth three separate theories of liability for it: (1) direct shipments to the Site (119 cys); (2) transshipments by Chem-Dyne (0); and (3) shipments by (3,548 gallons and 77 cys). GP objects to the liability based on numbers (1) and (3) and reserves its rights to object to (2) in the event any liability for GP is eventually based on Chem-Dyne transshipments.

Direct Shipments. As to the issue of direct shipments by GP to Skinner, GP stated that there is no evidence in the record to support the conclusion that the solid waste that GP shipped to the Site contained any hazardous substances. I addressed the subject of hazardous substances in the Preliminary Report at pages 27-34 and do not intend to repeat the discussion here. Additionally, the testimony was that the waste contained steel banding and nails, among other wastes. I see no reason in this process to except GP from this waste amount.

Waste Disposal. As to the liability for waste, GP believed that there was no evidence of how much waste may have sent to the Site and the Preliminary Report failed to find itself liable. GP further stated that there was no basis in law or fact for imposing liability on GP for the disposal of -generated waste. Lastly, GP believed that the company that GP sold the facility in question to, should also be found liable for waste disposal at the Site.

As to the volume issue, GP argued that the only volumetric evidence regarding waste disposal at Skinner consisted of two entries in the Skinner log totaling $312 and the testimony of Charles Ringel. In GP's opinion, the Preliminary Report used untested assumptions and inferences drawn therefrom, rather than relying on the log itself. This has not been an easy Site at which to develop a waste-in amount for each party, but I have carefully reviewed the Preliminary Report's analysis and am comfortable that it represents a reasonable analysis. The Preliminary Report utilized Mr. Ringel's testimony with respect to drummed waste and made reasonable assumptions regarding bag waste. The Preliminary Report also explained why the Skinner log entries represented separate waste amounts and then provided a rationale for the conversion of $312 to a waste-in amount. The analysis was consistent with the way other parties were treated and, arguably, understated the volume of waste represented by the dollar entries.

In regard to the issue of whether itself should be liable, GP stated that the disposal at Skinner took place during ownership of the facility. This was prior to GP's ownership. GP believes that if it has liability for this disposal, then must itself be liable as well. According to GP, should not be omitted just because the plaintiffs have dismissed it from the lawsuit. This is especially true, GP argues, in that Ohio law permits claims against dissolved corporations. I do not disagree that has a liability here. Plaintiffs elected not to sue or the remnants of in whatever form they might now exist. As between GP and , I regard this volume as a volume shared between them under CERCLA. However, in the context of this process, GP has complete responsibility for liabilities if GP has assumed those liabilities by contract or operation of law.

I so determined in the Preliminary Report. GP argued that I was wrong.

First, GP argued that the determination of successor liability is controlled by state law, citing City Management Corp. v. U.S. Chemical Co., 43 F.3d 244, 250 (6th Cir. 1994) and Anspec Co. v. Johnson Controls, Inc., 922 F. 2d 1240, 1248-49 (6th Cir. 1991). It then argued that, under Ohio law, traditional concepts of successor liability apply, i.e., that where there is a sale of a corporation's assets, the buyer is not liable for the seller's liabilities. It cited Dobbelaere v. Cosco, Inc., 697 N.E.2d 1016, 1021 (Ohio Ct. App. 1997) (citing Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1132-33 (Ohio 1993) and Flaugher v. Cone Automatic Mach. Co., 507 N.E.2d 331, 334 (Ohio 1987)). GP then explained that Ohio law recognizes four exceptions to this rule: (1) express or implied assumption of liabilities, (2) de facto merger or consolidation; (3) mere continuation; and (4) fraudulent intent to escape liability. (The fourth exception is not relevant here.)

GP stated that the Preliminary Report erred in recommending liability based on an assumption of liabilities in the Asset Purchase Agreement from . GP said that the Preliminary Report focused on the first page of the Asset Purchase Agreement. The first page contained the following language:

> G-P has delivered to a copy of G-P's Annual Report for the year ended December 31, 1967, along with a Proxy Statement directed to the stockholders of Georgia-Pacific Corporation dated September 20, 1967, and an Interim Report to its shareholders for the quarter ended March 31, 1968. has reviewed such documents and desires to enter into a

> reorganization with G-P within the meaning of Section 368(a)(1)(C) of the Internal Revenue Code of 1954, whereby will exchange substantially all of its assets for shares of Common Stock of G-P (hereinafter referred to as "G-P Stock"), and *G-P will assume the liabilities and obligations of* after which will, in the process of dissolution, distribute such shares to its stockholders according to their respective interests.

(Emphasis supplied). GP's Questionnaire Response, Exhibit 1, page 1.

GP believed that the Allocator failed to read this page in context with the other provisions of the Agreement which specifically enumerated the "limited liabilities" that GP agreed to assume in paragraph 4.2 of that Agreement.

In Article 4 of the Agreement, GP agreed "to assume and agreed to pay and discharge" the liabilities shown on the balance sheet, related to taxes, related to contracts and leases and related to the ordinary conduct of business after December 31, 1967 to the Closing date. After listing these liabilities, the Agreement then included the catch-all clause that GP assumed "other liabilities and obligations" of

> (not exceeding $25,000 in the aggregate), whether absolute, accrued, contingent or otherwise; always excepting, however, those arising out of or in connection with this transaction and the subsequent liquidation of

GP then also assumed all liabilities of related to its labor agreements and its pension plans.

GP's position is that this type of liability is not enumerated and, therefore, it was not assumed by GP. Citing Dobbelaere, GP said that the general principle is that an asset buyer is not liable for the seller's liabilities unless expressly stated. The Preliminary Report cited no authority, according to GP, for the proposition that, as a matter of contract interpretation, all liabilities not expressly allocated between the parties are to be imposed on the asset purchaser. GP said there is no policy reason for assigning this liability to the viable buyer when the seller is defunct where the law authorizes the prosecution of claims against a defunct party.

GP also discussed the de facto merger theory. GP claimed that the purchase of assets was mainly structured to comply with the 1960s tax-free reorganization provisions of the IRS Code, not to skirt potential environmental liabilities. GP's asset purchase was a triangle "C" reorganization pursuant to I.R.C. section 368(a)(1)(C) (1954). The transaction was structured in this manner, at least in part, to qualify for certain tax advantages that did not require the recognition of a gain or loss for income tax purposes for or its shareholders. It was not set up in this manner to avoid liability for CERCLA, which was not passed until eleven years later.

GP argued it was not a de facto merger since it was not a stock transaction. In Ohio, GP said, the following factors are hallmarks of a de facto merger: (1) the continuation of the previous business activity and corporate personnel; (2) a continuity of shareholders resulting from a sale of assets in exchange for stock; (3) the immediate or rapid dissolution of the

predecessor corporation; and (4) the assumption by the purchasing corporation of all liabilities and obligations ordinarily necessary to continue the predecessor's business operations. Welco Indus. at 1134. Based on Aluminum Wire Prod. v. Brad Smith Roofing, 671 N.E.2d 1343, 1355 (Ohio Ct. App. 1996), GP argued that all four factors were necessary to find a de facto merger. GP said that is not the situation here because there was no continuation of corporate personnel; no continuity of shareholders; the dissolution of has not been shown to have been rapid; and GP did not assume all liabilities necessary to continue business.

GP also believed that it was being treated differently than other parties similarly situated. It named

Finally, GP argued that if it is found liable for disposal, then that liability should be assessed against to which GP sold the assets in 1985. is not a defendant in this action at this time. GP argued that agreed to assume certain enumerated liabilities, just as GP had done in its agreement with

Plaintiffs' Reply Brief. Plaintiffs responded to each of GP's arguments. First, plaintiffs stated that the intention of the parties to the tax free reorganization is irrelevant – if the transaction looks like a merger, it will be treated like a merger. See, e.g., Cinocca v. Baxter Labs., Inc., 400 F. Supp. 527, 530 (E.D. Okla. 1975). Plaintiffs argued that, regardless of whether the transaction is called a sale of assets or a reorganization, courts have consistently held that transactions intended to take advantage of Section 368(a)(1)(C) are de facto mergers since they are deliberately structured to achieve results similar to statutory mergers. See, e.g., Morrison v. Newaygo Eng'g & Survey Co., No. 66023, 1994 WL 245659, at *2-*4 (Ohio Ct. App. June 2, 1994); HRW Sys., Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 336 (D. Md. 1993); In Re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 712 F.Supp. 1010. 1018-19 (D. Mass. 1989); Cinocca, 400 F.Supp. at 530-32; In re Master Key Antitrust Litig., M.D.L. Dkt. No. 45, 1976 WL 1377, at *2-*3 (D.Conn. Sept. 28, 1976).

Plaintiffs agreed with GP's enumeration of the factors that are hallmarks of a de facto merger. However, they stated that GP was in error in believing that it was necessary to find all four factors present in order to find a de facto merger. See, Acushnet at 1015. Nevertheless, plaintiffs state that, in the case of the GP transaction, all four factors are sufficiently established. As to the continuity of personnel, plaintiffs stated that GP continued business and the facts suggest that there was a continuity of personnel as well. As to continuity of shareholders, plaintiffs argued that distributed the GP stock it received in the asset sale to shareholders, thus establishing a continuity of shareholders. As to the rapid dissolution, under the terms of Agreement I, was required to promptly liquidate and dissolve after issuance and transfer of GP stock to . And as to the assumption of liabilities, the Agreement with includes the liabilities GP was to assume and they were the liabilities necessary to continue operating the business of

Plaintiffs then addressed the issue raised by GP of whether a dissolved corporation, should be allocated a share since Ohio law permits such entities to be subjected to suit. Plaintiffs argued that Ohio's capacity law has been preempted by CERCLA. See Stychno v. Ohio Edison Co., 806 F.Supp. 663, 669 (N.D. Ohio 1992). Since was dissolved approximately 30 years ago, it is not practical to pursue such an entity and plaintiffs believe that is not a person within the meaning of CERCLA.

Plaintiffs then state that there is no support for the proposition that should receive a share of liability as GP has suggested. The GP Agreement provided that assumed and agreed to pay only certain liabilities of GP. Environmental liabilities from waste disposal was not included in the limited liabilities assumed by as the buyer.

Assumption of Liabilities. I have re-read the Preliminary Report's discussion. I wrote:

> This contract does not, in my judgment, represent a simple sale of assets. By its terms, GP specifically assumed the liabilities of "whether absolute, accrued, contingent or otherwise." The aggregate limit of $25,000 is not a limitation that helps GP. Nor does the indemnity. The indemnity was limited to liabilities of *existing at December 31, 1967* and not shown on the balance sheet. The CERCLA liability of did *not* exist at December 31, 1967. It only came into existence after CERCLA was adopted in 1980. The limit of $25,000 in Paragraph 4(e) related to and must be read in conjunction with the indemnity in Article VI. Read together, GP accepted *all* liabilities of out received an indemnity for liabilities in excess of $25,000 that (a) existed at December 31, 1967 *and* (b) were not shown on the books. This liability does not fit that description.
>
> Moreover, in two places in the document, as noted above, there is an explicit reference to GP's assumption of liabilities as part of the tax-free reorganization.

As noted earlier, GP may have a claim against but I do not see how this contract language can be interpreted in any way other than how it is interpreted in the Preliminary Report. The Preliminary Report does not determine that all liabilities not expressly allocated between the parties are to be imposed on an asset purchaser. It determined that the contract, in this case, provided for the assumption of all liabilities by GP "whether absolute, accrued, contingent or otherwise" with an indemnity for liabilities in excess of $25,000 that existed on December 31, 1967 and were not shown on the books. This CERCLA liability did not exist on December 31, 1967 but is a liability that is "contingent or otherwise." The assignment of responsibility here is not a function of policy but of the contract between the parties.

I have read the Dobbelaere decision. In that case, the court of appeals found the asset purchaser liable because it had assumed the liabilities of the seller. 697 NE2d at 1022. This case does not help GP here.

De Facto Merger. The "hallmarks" of a de facto merger do exist here, contrary to GP's assertions. The selling corporation had to dissolve for the tax free reorganization to occur and the contract so required. The selling corporation's shareholders became shareholders in the buying corporation under the terms of the contract between the parties. The agreement specifically provided that the seller do nothing to interfere with the transfer of an ongoing

business to the buyer and that all personnel would be preserved. As the Preliminary Report explained:

> Until the Closing date, . . . also agreed that, unless it had the prior consent of GP, it (a) would not dispose of its properties or assets except in the ordinary course of business; (b) would not issue stock or pay dividends; (c) would not discharge liabilities except in the ordinary course of business; (d) would not mortgage, pledge or subject to lien or other encumbrance any of its properties or assets; (e) would not increase the compensation of officers, employees or agents except for normal merit increases; (f) would use its best efforts to preserve its business organization, to keep available to GP the services of present officers and employees, and to preserve for GP its business relations with suppliers and others having normal business relations with ; (g) would not change its Articles of Incorporation or By-Laws; and (h) would not enter into any contract or lease except in the ordinary course of business and then only with the prior consent of GP if the amount involved exceeded $10,000.

Plaintiffs recitation of the case law on the treatment of tax free reorganizations as de facto mergers is persuasive. GP does not deal with Morrison which held that a purchase as part of a tax free reorganization raised a genuine issue of fact for the trier of fact on the existence of a de facto merger. 1994 WL 245659 at *4. The Aluminum Line Products Co. decision is easily distinguishable. It involved the sale of assets at a public auction after the seller company had already dissolved. I see no reason to change the recommendation in the Preliminary Report on GP's responsibility here for the liabilities of .

Similarity of Treatment. I have reviewed the Preliminary Report's discussion of on the issue of successor liability. I am comfortable that the facts with respect to each of these parties are dissimilar from the facts here and that there is no inconsistency in the treatment of the parties. These parties were not involved in a tax free reorganization under an agreement that contained language by which the buyer assumed the liabilities of the seller. had no agreement as best I can tell have an agreement but I elected not to comment on the rights of the parties against each other because elected not to submit a brief on the subject. is financially responsible and the parties can resolve the issue of their contract rights and obligations separately. did not assume any liabilities in its agreement but, again, it and can resolve any dispute between them as they see fit. is financially responsible and is participating in this process.

is not an ADR participant. GP can pursue if it believes that it has a claim against . I am not going to address a private contract dispute with only one party involved here.

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October 15, 1999

Via Facsimile and U.S. Mail

Mr. Craig Melodia
C-14J
USEPA Region 5
77 West Jackson Boulevard
Chicago IL 60604

Re: Skinner Landfill Site
Our Client: Georgia-Pacific Corporation
Our File No. 11533-17

Dear Mr. Melodia:

Responding to your voice mail, enclosed is the final Allocator Report appropriately redacted to only list the entry for Georgia-Pacific Corporation. I apologize for not getting this to you earlier this week, but as I think you know I have been out of town.

Please do not hesitate to call if you have any questions.

Sincerely,

OPPENHEIMER WOLFF & DONNELLY LLP

Gary P. Gengel

GPG:sf
Enc.

cc: Michael J. O'Callaghan, Esq., via US mail (w/enc.)
Ronald T. Allen, Esq., via US mail (w/enc.)

Name Of Party	Solid Waste in Cys	Liquid Waste in Gallons	Solid Waste In Total Cys	Percentage	Liquid Waste In Total Gallons	Percentage	Solid Waste	Liquid Waste	Owner/ Operator	Rest of Chem-	Total
GEORGIA-PACIFIC (MULTI-COLORTYPE CORP.)	119	3548	372906	0.0319%	262252	1.3527%	0.00%	0.27%			0.27373%